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No. 03-1503

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS GOUGHNOUR, *Petitioner-Appellant,*

v.

FERNANDO BELMONTES, *Respondent-Appellee.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE NINTH CIRCUIT'S OPINION IS IRRECONCILABLE WITH THIS COURT'S HOLDING IN *BOYDE v. CALIFORNIA*, 494 U.S. 370 (1990)

In Belmontes' opposition to the certiorari petition, he conspicuously sidesteps any discussion of the Ninth Circuit's misapplication of *Boyde*. He attempts to recast the circuit court's holding in terms of a fact-specific inquiry. In this regard, Belmontes seeks to minimize the circuit court's controlling emphasis on California's "unadorned factor (k)" instruction. At the same time, Belmontes avoids the *Boyde* issue by shifting the focus to the circuit court's subsidiary discussion of the trial court's allegedly improper responses to Juror Hern's questions during deliberations.[1/]

1. As discussed in the opening petition for writ of certiorari, this complaint about the judge's responses to Juror Hern's questions was the sole basis of any claim of instructional error raised in the Ninth Circuit and, for the matter, was the only claim of penalty-phase instructional error raised in Belmontes' many years of federal habeas litigation. However, it was not decisive or necessary to the Ninth Circuit holding of instructional error.

Belmontes' argument fails because, under any rational reading, the Ninth Circuit's holding of instructional error turns on the "unadorned factor (k)," instruction's purported failure to instruct jurors to consider "forward-looking" evidence of a defendant's future prospects in prison. App. 53a-60a. The distracting discussion about the mid-deliberation colloquy with Juror Hern merely supplements the circuit court's holding regarding the "unadorned factor (k)." The Ninth Circuit even concluded that the trial court's answers to Juror Hern served *only* to "[c]ompound[ ] the problems with the original and supplemental instruction. . . ." App. 61a-631.

As discussed in the petition for writ of certiorari, however, there simply was no "problem" to compound. As was true in *Boyde*, the jurors in this case would have reasonably understood the "unadorned factor (k)" instruction as permitting consideration of all pertinent evidence offered in mitigation, whether or not it related to the crime itself. *Boyde*, at 381-383. They certainly would have realized they could consider evidence of Belmontes' character for good future behavior in prison as being an "inevitable" element of their sentencing determination. *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986). Indeed, the "unadorned factor (k)" instruction provided more than constitutionally-adequate guidance about the "forward-looking perspective of future dangerousness" which—consistent with *Boyde* and *Skipper*—"is not independent of an assessment of personal culpability." *Johnson v. Texas*, 509 U.S. 350, 369-370 (1993).

In any event, Belmontes' protestations about the mid-deliberation colloquy with Juror Hern are unavailing. During this informal conference with the jurors, the court directed them to "go over the instructions again with one another." The trial court's directive to review the previous instructions would have cured any possible confusion. *See Weeks v. Angelone*, 528 U.S. 225 (2000) (no likelihood of confusion where the trial judge referred jury back to original instructions when the jury asked a question regarding the instructions themselves).

The previous instructions given in this case included the "unadorned factor (k)," which, as in *Boyde*, unambiguously informed the jurors that (1) they were to "consider all of the evidence which has been received during any part of the trial" and (2) they were to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Additionally, the previous instructions included the following "special instruction":

> [T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

The trial court never said anything to indicate the jurors were limited or in any way restricted from using any mitigating evidence in any way they saw fit. To the contrary, the jurors were expressly told their consideration of any possible mitigating factors was unlimited. There is virtually no chance, let alone a reasonable likelihood, that the jurors misunderstood any of the court's instructions to prevent the consideration of any constitutionally relevant evidence. *Boyde*, at 380. As discussed in the petition for certiorari, the Ninth Circuit's finding to the contrary rests on an illusory distinction of *Boyde* and on an unreasonable review of the record. This Court's supervisory intervention is necessary to correct the Ninth Circuit's errant legal judgment in this case and to ensure that such a faulty interpretation of federal constitutional law will not

extend to future cases.

THE NINTH CIRCUIT'S OPINION RESTS ON A NEW RULE IN VIOLATION OF *TEAGUE v. LANE*, 489 U.S. 288 (1989)

Belmontes also insists the Ninth Circuit's opinion does not rest on a new rule but, instead, was somehow "compelled" by precedent predating the finality of his judgment.[2/] As discussed, however, the circuit court's opinion clearly turns on the sufficiency of the "unadorned factor (k)," and there is simply no preexisting authority to question the constitutionality of that instruction, or for that matter, any similar instruction. There certainly was no precedent at the time Belmontes' judgment became final which would have dictated the conclusion reached by the Ninth Circuit in this case. *Stringer v. Black*, 503 U.S. 222, 227-29 (1992); *Butler v. McKellar*, 494 U.S. 407 (1990); *Teague*, 489 U.S. 288.

Indeed, Petitioner believes the present *Teague* inquiry is particularly germane in light of this Court's recent grant of certiorari in *Goughnour v. Payton*, ___ S. Ct. ___ 2004 WL 3488 (May 24, 2004) (No. 03-10-30). In *Payton*, the Ninth Circuit found that the California Supreme Court had misapplied this Court's controlling precedent in rejecting a claim that the "unadorned factor (k)" instruction was insufficient to inform jurors they could consider evidence of the defendant's post-

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2. In support of this proposition, Belmontes cites *Eddings v. Oklahoma*, 455 U.S. 104, 112-117 (1982) and *Lockett v. Ohio*, 438 U.S. 586-606-609 (1978), which both stand for the simple proposition that a state may not affirmatively *prevent* a jury from considering relevant evidence in mitigation. Belmontes also cites *Penry v. Lynaugh*, 492 U.S. 302 (1989), which is equally unavailing and, in any event, is irrelevant for *Teague* purposes because it was decided after Belmontes' judgment became final. *See Belmontes v. California*, 488 U.S. 1034 (1989). In light of *Boyde, Eddings* and *Lockett* are simply too general a line of authority for Belmontes to rely upon. *Cf. Sawyer v. Smith*, 497 U.S. 227 (1990).

crime religious conversion and good behavior in prison. *Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003). On May 24, 2004, this Court granted certiorari on the question of whether the circuit court's finding violated the AEDPA. *See* 28 U.S.C. § 2254(d).

Although the present case is not governed by the AEDPA, Petitioner believes the present *Teague* issue has direct bearing on the issue presented in *Payton*. In both *Belmontes* and *Payton*, the Ninth Circuit has interpreted the "unadorned factor (k)" instruction as being insufficient to inform jurors they could consider "forward-looking" evidence of future prison adjustment. In this respect, the question of whether such an interpretation "was contrary to, or involved an unreasonable application of," this Court's clearly established precedent (28 U.S.C. § 2254(d)) is closely related to the question of whether such an interpretation was dictated by precedent before the finality of Belmontes' judgment. *Teague*, at 301. For this reason as well, Petitioner submits a writ of certiorari should issue in this case.

CONCLUSION

For all of the aforementioned reasons, Petitioner respectfully requests that the petition for writ of certiorari be granted.

Dated: June 15, 2004

Respectfully submitted,

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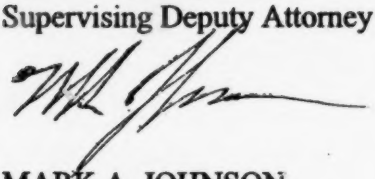

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